No. 15,854

IN THE

United States Court of Appeals

For the Ninth Circuit

HAL GILFILEN,

Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF OF APPELLANT.

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JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of this case by virtue of the provisions of Title 53, Chapter 2, Alaska Compiled Laws Annotated, 1949, and 48 U.S.C. 101 and 193. This Court has jurisdiction by virtue of 28 U.S.C. 1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 U.S.C. 1294 which designates this Court

as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE.

On December 16, 1955, appellant Hal Gilfilen filed a complaint in the District Court for the District of Alaska, Third Division, against the City of Seward, a municipal corporation of the Territory of Alaska. The complaint alleged the status of the defendant as a municipal corporation organized and existing under the laws of the Territory of Alaska; that within the corporate limits of the defendant city there was located a widely used public street designated as Fourth Avenue and that there was laid out upon said public street along its Eastside a certain public sidewalk extending parallel to the street; that the public street and sidewalk just referred to, for many years up to the present, had been treated and controlled by the defendant city as a public street and sidewalk; that for a long period of time prior to February 12, 1954, snow and ice had accumulated upon this sidewalk to such an extent as to make travel over it unsafe for pedestrians, in that such snow and ice had accumulated on the sidewalk in an irregular shape, was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the sidewalk; that the defendant city knew, or by the exercise of ordinary care and diligence should have known, of the unsafe condition of the sidewalk and could have removed the accumulation of ice and snow

in a reasonable time before the injury to the plaintiff complained of occurred; that on February 12, 1954, at 8 p.m., the plaintiff, while carefully and lawfully walking on the aforementioned sidewalk in a Northerly direction, because of the unsafe condition of the sidewalk described above, slipped and fell on his left side; that as a result the plaintiff had his left wrist broken, and his elbow dislocated, received a chipped bone in his shoulder, was painfully and permanently injured and disabled and incurred expenses for medical attention and hospitalization, etc. Plaintiff sought judgment against the defendant for his actual medical and hospitalization expenses in the sum of $7,166.10; for loss of earnings in the sum of $13,675.00 and for $25,000.00 general damages for his injury (R. pp. 3-6). The plaintiff demanded a jury trial of his cause (R. p. 6).

On January 26, 1956, defendant city (appellee herein) appeared and filed its answer in which it admitted its corporate status and the location, existence and general use of Fourth Avenue as a public street, as well as the laying out upon it of the public sidewalk mentioned in the complaint. It denied that it had "treated and controlled" such street and sidewalk as a public street and sidewalk, and further alleged to be without knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to the accumulation of ice and snow upon the sidewalk for a long period of time; the insecure and unsafe condition of such sidewalk; the shape, nature and appearance of such accumulation; or the hazard

to pedestrians resulting therefrom. It denied that it had or should have had notice or knowledge of the condition; admitted that the plaintiff slipped and fell as alleged, but denied, or disclaimed knowledge of, the circumstances surrounding the accident or the damages flowing therefrom (R. pp. 6-8).

On February 23, 1956, appellee City of Seward (defendant below) caused to be taken the deposition of the appellant (plaintiff below), which is set forth on pages 9-43 of the record. On February 25, 1957, appellee filed its motion for summary judgment on the grounds that (1) defendant city was under no legal obligation, with respect to the plaintiff, to remove "natural accumulations of ice and snow" from its sidewalks, and therefore the complaint did not state any cause of action; (2) that the plaintiff was guilty of contributory negligence as a matter of law; and (3) that the plaintiff, as a matter of law, assumed the risk of whatever injuries he incurred, and that therefore the defendant is entitled to summary judgment as a matter of law (R. p. 44). This motion was supported by an affidavit of the attorney for defendant below reciting certain statements contained in the plaintiff's aforementioned deposition (R. pp. 46-47).

In accordance with Rule 56 of the Federal Rules of Civil Procedure and Rule 5(e)(2) of the Amended Uniform Rules of the District Court for the District of Alaska, appellant (plaintiff below), filed a pleading entitled "Statement of Genuine Issues" (R. p. 45). In it, he alleged that the following were genuine issues necessary to be litigated:

1. Whether or not the plaintiff was contributorily negligent as a matter of fact;

2. Whether or not, as a matter of fact, plaintiff assumed the risk of injury when he walked upon the sidewalk in question; and

3. Whether or not, as a matter of fact, the snow and ice which had accumulated upon the sidewalk in question was a "natural" accumulation as was presupposed by the motion for summary judgment.

On August 22, 1957, the District Judge entered a final judgment in favor of the appellee City of Seward (defendant below), based upon *"findings of fact" (sic),* filed concurrently therewith, to the effect that the court finds that: (1) the court had jurisdiction over the parties and subject matter of the action; (2) on February 12, 1954 the plaintiff slipped upon a sidewalk covered with ice and snow in the City of Seward, Alaska; (3) the accumulation of ice and snow upon which the plaintiff slipped was a natural accumulation *(sic);* (4) the plaintiff slipped on the said sidewalk by reason of his own contributory negligence; (5) the plaintiff knew the condition of the sidewalk, and voluntarily attempted to pass over it, and assumed the risk of any injuries incurred thereby. Based upon these "findings of fact" the District Court drew conclusions of law, to wit: (1) the City of Seward was under no legal obligation, with respect to the plaintiff, to remove *natural (sic)* accumulations of ice and snow from its sidewalks; and, therefore, *the complaint failed to state a claim for relief;* (2) *as a matter of law,* the plaintiff was guilty of contribu-

tory negligence, and assumed the risk of whatever injuries he incurred and was consequently precluded from any recovery; and (3) the defendant was entitled to summary judgment *as a matter of law* (R. pp. 48-50, Italics supplied).

From the foregoing final judgment and from an amended judgment dated October 9, 1957, entered for the purpose of fixing the amount of costs and attorneys' fees to be recovered by defendant (appellee herein), the plaintiff below has appealed to this Court.

STATEMENT OF THE FACTS.

Appellant herein (plaintiff below) is engaged in business in the City of Seward, Territory of Alaska (R. p. 10). Seward is located at the head of Resurrection Bay, on the Southeastern shore of the Kenai Peninsula, 114 miles South of the Alaskan hub city of Anchorage.

The ninth annual edition of Jacobin's Guide to Alaska[1] describes the City of Seward as follows:

> "Seward, ideally located at the head of a perfect harbor, is the metropolis of the world-famous Kenai Peninsula, greeting the tourist and the sportsman with a fresh, clean breath of Northern Alaska and the Interior. A modern city with up-to-date stores, shops, hotels and restaurants, movie theater, bank, laundries, cleaning plants, and entertainment spots, Seward is a far cry from

[1]Published by Guide to Alaska Co., Juneau, Alaska. Distrib. Office for U.S.: 6015 Santa Monica Blvd., Los Angeles 38, Calif.

the wasteland that Alaska was believed at one time to be. It boasts of excellent schools and churches and a fine hospital maintained by the Methodist Mission, a small boat harbor, canneries, machine shops, auto sales and service, clubs, lodges, Chamber of Commerce, and a bi-weekly newspaper. * * * With one of the finest land-locked harbors, Seward has long been known as 'the Gateway to the Kenai', southern terminus of the Alaska Railroad, northern terminus of the Alaska Steamship Company. * * * Seward was founded in 1904 by solid American citizens and is today a typical American town. * * * Once a visitor lands in Seward and spends a few hours he feels quite at home with the Seward Alaskan. Plans are being laid in Seward for new impetus since the war, for new avenues of contact with neighbors, new conveniences, new industries, and a new Seward and Kenai Peninsula. A new highway to Anchorage and the western shores of Kenai has put Seward in closer touch with the fast-growing farming communities of Homer and the interior of Alaska. Although the growing season is short, excellent fruits and vegetables are raised in and about Seward, where peas are found in gardens in October, turnips and carrots of fine quality in middle November. * * *''

loc. cit., at pp. 203, 205.

In a book, published in 1954,[2] entitled "The State of Alaska", by Ernest Gruening, former governor of the territory of Alaska, there appears a map (on page 462) showing isotherms, *i.e.,* lines of equal average

[2]Random House, N.Y.: Library of Congress Catalog Card No. 54-7799.

temperature for winter months in Alaska, Canada and the United States. One of these lines of equal temperature (30°) runs across the mouth of Cook Inlet along the southern shore of the Kenai Peninsula and directly through the City of Seward; thence along the coast of the Alaska Gulf through Juneau, parallel with the coastline of Southeastern Alaska and British Columbia through Vancouver, B.C., Seattle, and thence curving South parallel with the Pacific Coast through Reno, Nevada; thence curving East through Arizona, New Mexico and across the middle tier of States until it touches St. Louis, Missouri; thence further due East until it approaches the Atlantic Coast just West and North of Washington, Philadelphia and New York City. A second isothermal zone includes the Southern part of Western Alaska, including Anchorage and the Matanuska Valley, Western Canada, and the Northern tier of the United States, including such cities as Denver, Omaha and Chicago, as well as Ontario, Canada and the New England states. Commenting on the map, Governor Gruening states:

> "The isotherms above, showing lines of equal average temperature for winter months, reveal more strikingly than words the facts about Alaska's climate. Due to the Japan Current, which skirts the entire Pacific Coastal area, its cities and towns, containing the greater part of Alaska's population, enjoy milder winters than the Northern parts of the United States. Ketchikan's and Sitka's winter temperatures approximate those of Washington and Philadelphia respectively, Juneau's those of New York City, and are higher

than those of Boston, Detroit, Chicago, Omaha and Denver. The winter temperatures of the Anchorage area are higher than those of Northern New England, Wisconsin, Minnesota, the Dakotas, Wyoming and Montana. Even Nome, less than a hundred miles below the Arctic Circle, has winter temperatures higher than those of the provincial capitals of Winnipeg and Regina just North of the United States-Canada boundary. * * *"

lot cit., at p. 462.

The Committee report on S. 50, of the Eighty-second Congress, contains the following pertinent comments on the climate of this part of Alaska:

"The January mean temperature of 20 degrees above zero in Anchorage compares to that in Concord, New Hampshire. The January mean of 33.6 degrees at Ketchikan is about the same as Denver and New York. Ketchikan's record low of 8 degrees below zero approximates record low temperatures for Washington, D.C. and is considerably warmer than the record cold in such cities as Chicago and Boston. * * * The average annual precipitation in Alaska in its present agricultural areas is 11.71 inches in the Tanana Valley, 15.45 inches in the Matanuska Valley and 32.59 inches on the Kenai Peninsula.[3] * * * Despite the fact that Alaskan waters are 100 miles to the North, there are more frozen rivers and harbors in the United States than there are from the Aleutians to the Southern tip of the Alaska Panhandle. This is largely due to the influence

[3]Compare, *e.g.,* Chicago, Ill. 32.72 in.; Kansas City, Mo. 35.31 in.; New York, N.Y. 42.03 in.; Seattle, Wash. 31.92 in.; Washington, D.C. 41.52 in.

of the Japanese Current which skirts the Alaska coast * * *."

82nd Congress—First Session, Senate Report 315, p. 17.

The official information bulletin relative to the disposal and leasing of public lands in Alaska (Information Bulletin No. 2), published by the Bureau of Land Management of the United States Department of the Interior, states as follows:

"The South-Central region includes the Prince William Sound and the Cook Inlet sections of the Southern coast, and it extends North to the Alaska Range. There is regular steamship service from Seattle to Valdez, the Southern terminus of the Richardson Highway, and to Seward, the Southern terminus of the Alaska Railroad.

"Along the coast of Prince William Sound, the topography, climate and vegetation somewhat resembles Southeastern Alaska. The winters are relatively mild, summers are cool, and precipitation is generally heavy.[4] On the inner coastal lowlands of Cook Inlet, the topography is more uniform. The climate is a favorable combination of the temperate coastal climate of Southern Alaska and the extreme continental climate of the interior.* * *

"Within south-central Alaska, conditions affecting settlement vary from area to area * * *. Certain localities offer, at this time, much better settlement opportunities than do others. Among the more favored areas are parts of the Kenai

[4]*NB:* Seward lies inland from Prince William Sound, on sheltered Resurrection Bay.

Peninsula, the area around Anchorage, and the Matanuska Valley. * * *''

loc. cit., at pp. 10-11.

On February 12, 1954, at about 8 p.m., the appellant (plaintiff below), left a building he owned, located on the East side of Fourth Avenue, a main public street in the City of Seward, for the purpose of visiting a retail establishment likewise owned by him, located on the same street, in a Northerly direction (R. pp. 10, 11, 12). The temperature was just about freezing, *i.e.,* in the lower thirties (R. p. 14). There had not been any precipitation of snow in the city of Seward for several days (R. p. 14). There was no wind (R. p. 18). Appellant was wearing brown oxford shoes and possibly rubber overshoes (R. p. 18).

He proceeded in a Northerly direction, on and along the public sidewalk which is laid out on the *Eastside* of Fourth Avenue, heading towards his retail store, passing certain business establishments known, respectively, as the Legion Cab Office and the Alaska Shop on the way (R. pp. 11, 12, 21). In obedience to a Seward City ordinance, which shifts the burden of the actual cleanup of sidewalks to the owners of adjacent property,[5] the sidewalk in front

[5]Legal authority for this ordinance is derived from Sec. 16-1-90, ACLA 1949, which reads as follows: "Sec. 16-1-90. *Clearing sidewalks of snow: Assessment for: Lien of assessment: Penalty and interest.* The Council shall have authority by ordinance to require the owners of all real property in the city at their own expense to keep the sidewalks in front of their respective premises reasonably clear from snow, and, in event they fail to do so in conformity with ordinances enacted for that purpose, the council shall have authority to cause the snow to be removed from such

of these establishments had been cleared of snow (R. p. 19). As he proceeded further North he came to a portion of the sidewalk lying directly in front of a 22-foot wide vacant lot, owned by one Baumgartner and known as Lot 27, Block 9, Seward Townsite (R. pp. 4, 11, 12, 13, 18, 20). The sidewalk directly in front of this vacant lot was covered with an accumulation of packed and frozen snow, which had turned into a mound of ice estimated to have been from 4½ to 8 inches thick. This accumulation was of irregular shape, and was packed and frozen, and so elevated, uneven and ridged as to make insecure the footing of persons walking upon the sidewalk (R. pp. 14, 15, 19). Similar obstructions existed on part of the sidewalk on the *Westside* of Fourth Avenue (R. pp. 17, 19).

Although this condition had been brought to the attention of city officials prior to the time of the accident (R. p. 17), the city had failed to cause its removal and it had remained in its unsafe condition all winter long (R. p. 14). The street adjoining the sidewalk was partly obstructed by automobiles, which under a city ordinance were parked at a 30-degree angle (R. p. 21). Moreover, the section of Fourth Avenue directly adjacent to that portion of the sidewalk on which the aforementioned accumulation of

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sidewalk and assess the cost thereof against such premises in the manner provided by ordinance for that purpose. Such assessment shall be a paramount lien upon the premises against which it is assessed and may be collected and enforced as general taxes or special assessments for improvements are collected and enforced. The council may also provide for penalty and interest after delinquency to the extent authorized in case of assessment for local improvements as provided in this Article."

snow and ice was situated was covered with packed snow and there was a sheet of ice on it stretching across the sidewalk on the opposite side, because of water which had frozen following a fire. The fire had occurred, on the morning of the day of appellant's accident, at the Seward Bakery, located on the West-side of Fourth Avenue, directly opposite the vacant lot just referred to (R. pp. 34, 35).

As appellant proceeded North on the sidewalk, laid out on the Eastside of Fourth Avenue, he left the cleared portion of the sidewalk and stepped onto the accumulation of ice and snow in front of the vacant lot. He took a few steps and then, in his own words, "my feet went straight up. I threw out my arm to catch myself—and at that time I weighed 210 pounds —and I lit with my hand and also injuring my wrist and hand, dislocated the elbow and had several other impacts * * *. I was picked up by a man named Ray O'Hara who is the City Manager of Seward and was taken to the Seward General Hospital. * * *" (R. pp. 11, 20). As a result of the injuries sustained, appellant had to undergo prolonged, painful and costly treatment, partially lost the use of his arm, wrist and shoulder and was put to heavy loss of income, compelling him to go into debt (R. pp. 21-40).

The obstruction of the sidewalk which caused appellant's fall was plainly visible and was known to appellant to exist (R. p. 15). There is some evidence that appellant knew of other persons who had fallen in that vicinity before February 12, 1954 (R. pp. 15, 16), but it does not appear that he acquired this

knowledge prior to his own accident (R. pp. 15-17). The unsafe condition of the sidewalk was known to the appellee, the City of Seward (R. p. 19).

There were several eye witnesses to the accident who would have been called in the event of trial (R. pp. 20, 21). The record contains no evidence rebutting appellant's allegations (R. p. 4) that he was proceeding "carefully and lawfully" across the sidewalk, obstructed in the manner described above, when the accident occurred. Nor is there any evidence to rebut his allegations and testimony (R. pp. 4, 14, 17) that the appellee (defendant below) City of Seward knew of the existence of the hazardous condition of the sidewalk, but failed to perform its legal duty to remove the obstruction, during the entire winter. The dangerous and icy condition of the street adjoining the East sidewalk and the fact that the West sidewalk was likewise obstructed in at least two places, in front of the Seward Bakery and near the Seward Laundry (R. pp. 19, 35), remains likewise uncontradicted. There is nothing in the record to show the relative degree of impassibility of these alternate routes. It is uncontroverted that the appellant was lawfully and properly upon the sidwalk in the course of proceeding from a building which he owned to a retail store likewise belonging to him and located on the same street.

Not only has the City of Seward failed to introduce any affirmative showing to rebut the allegations concerning the dangerous obstruction of the sidewalk in the form of an accumulation of ice and snow, as described in the complaint, or to disprove its neglect in failing to remove it, but indeed it has admitted in its

pleadings that "it is without knowledge or information sufficient to form a belief as to the truth" of these allegations (R. p. 7). Nothing is shown to explain *why* appellee failed to acquire such information, as alleged. The record in fact consists of the pleadings, the testimony of the appellant (plaintiff below) and certain climatological data, which were introduced by the appellee (defendant below), and which generally indicate that Seward experiences about the same type of winter weather as is common to many cities in the Northern and Central portions of the United States *(vide supra).*

ISSUES PRESENTED.*

1. *Where genuine issues of fact have been raised as to the nature of an accumulation of ice and snow on a sidewalk causing a pedestrian to slip and fall; and as to whether or not such pedestrian was guilty of contributory negligence, or assumed the risk, when he used the obstructed sidewalk with knowledge of its condition, was it error for the District Court to enter summary judgment for the defendant?*

2. *Did the District Court err in finding as a matter of fact and ruling as a conclusion of law that appellant (plaintiff below) was guilty of contributory negligence and that he assumed the risk of injuries incurred, when he passed over a sidewalk obstructed by an accumulation of ice and snow?*

3. *Did the District Court err in finding as a matter of fact and adopting as a conclusion of law that the*

*Comprising Specifications of Error.

accumulation of ice and snow which caused appellant's injury was a "natural" accumulation and that therefore the appellee was under no legal obligation, with respect to appellant, to remove such accumulation?

ARGUMENT.

1. WHERE THERE ARE GENUINE ISSUES OF FACT MATERIAL TO THE CLAIM FOR RELIEF, IT IS ERROR TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE PLEADINGS AND PLAINTIFF'S TESTIMONY AT AN ORAL DEPOSITION.

Summary judgment procedures are authorized by Rule 56 of the Federal Rules of Civil Procedure, in specific implementation of the underlying philosophy of the Federal Rules as stated in Rule 1 "to secure the just, speedy and inexpensive determination of every action." As stated by Professor Moore in his treatise on Federal Practice "if Rule 56 is applied with wise discernment it will materially aid the general objective of the Rules by eliminating useless trials. If it is not so applied, it will delay a final determination that is just."

6 Moore's Federal Practice (2nd Ed.) 2012.

The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to

defeat in whole or in part the recovery of a just claim or the expeditious termination of an action because of a meritorious defense that is factually indisputable.

Functionally, the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The *crux* of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment. As Justice Jackson stated in *Sartor v. Arkansas Natural Gas Co.*, (1944), 321 U.S. 620, 624, 64 S.Ct. 724, 88 L.ed. 967: "A summary disposition * * * should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

There is an important distinction, however, between summary judgment and directed verdict. Where the defendant's motion for a directed verdict is sustained at the end of plaintiff's case, the judge has at least heard testimony at a live trial, but if the trial court improperly sustains a motion for summary judgment, reversal follows with its attendant delay and expense. By means of Rule 50(b), the directed verdict trial technique, moreover, has been molded so that a legal decision by the trial court can be obtained with a minimum of judicial waste. The summary judgment procedure on the other hand is productive of grave injustice or waste, or both, where judgment is improvidently granted.

6 Moore's Federal Practice 2022-2023.

The function of the summary judgment is to avoid a useless trial; and a trial is not only not useless but absolutely necessary where there is a genuine issue as to any material fact. In ruling on a motion for summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues.

Arnstein v. Porter, (CCA 2d, 1946), 154 F.2d 464, 471.

Summary judgment may properly be granted upon the pleadings as amplified by evidence contained in a deposition, but unless the deposition offered in support of a motion for summary judgment, together with other supporting materials, if any, clearly establishes that there is no genuine issue of material fact, the motion for summary judgment must, of course, be denied.

Griffith v. William Penn Broadcasting Co., (E.D.Pa., 1945), 4 FRD 475.

The problem of the improvident granting of summary judgments in cases involving disputed material facts has arisen in each of the circuits. Thus in the First Circuit, in *Peckham v. Ronrico Corp.,* (CA 1st, 1948), 171 F.2d 653, 657, the court in reversing summary judgment for the defendant observed that: "A litigant has a right to a trial where there is the slightest doubt as to the facts." See also:

Landy v. Silverman, (CA 1st, 1951), 189 F.2d 80, 82.

The Second Circuit, speaking through Judge Frank in *Metal Furniture Co. v. United States,* (CCA 2d,

1945), 149 F.2d 130, 135, admonished the trial courts in this manner:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgments. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay (citing cases). The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered."

See also:

Dunn v. J. P. Stevens & Co., (CA 2d, 1951), 192 F.2d 854 (action for personal injuries from fall upon a sidewalk abutting defendant's premises. Summary judgment for defendant on the pleadings, reversed).

And see:

Sartor v. Arkansas Natural Gas Corp., (supra);

Arenas v. United States, (1944), 322 US 419, 64 S.Ct. 1090, 88 L.ed. 1363;

Whitaker v. Coleman, (CCA 5th, 1940), 115 F. 2d 305, 306;

McElwain v. Wickwire Spencer Steel Co., (CCA 2d, 1942), 126 F.2d 210;

Weisser v. Mursam Shoe Corp., (CCA 2d, 1942), 127 F.2d 344, 145 ALR 467;

Toebelman v. Missouri-Kansas Pipeline Co., (CCA 3d, 1942), 130 F.2d 1016;

General Accident, etc. v. Goodyear Tire & Rubber Co., (CCA 2d, 1942), 132 F.2d 122;

Walling v. Fairmont Creamery Co., (CCA 8th, 1943), 139 F.2d 318;

Walling v. Reid, (CCA 8th, 1943), 139 F.2d 323;

M. Snower & Co. v. United States, (CCA 7th, 1944), 140 F.2d 367.

Again, in *Toebelman v. Missouri-Kansas Pipeline Co., (supra),* the Third Circuit through Judge Maris stated in a relatively early case that:

> "Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. * * * All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."
>
> *loc. cit.,* at p. 1018.

See also:

Sarnoff v. Ciaglia, (CCA 3d, 1947), 165 F.2d 167.

And in *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.,* (CA 3d, 1951), 190 F.2d 817, 824, Judge Staley laid it down that "the law is clear that one who moves for a summary judgment has the burden

of demonstrating that there is no genuine issue of fact."

In reversing a summary judgment for the defendant, in an action to recover damages for breach of a rental contract, the late Chief Judge Parker, for the Fourth Circuit, stated in *Stevens v. Howard D. Johnson Co.,* (CA 4th, 1950), 181 F.2d 390:

> "The motion for summary judgment, authorized by Rule 56, which in effect legalizes the 'speaking' demurrer, has an important place in providing a prompt disposition of cases which have no possible merit and in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only where it is clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law (citing cases). And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom (citing cases)."
>
> *loc. cit.,* at p. 394.

In the case just cited the plaintiff had demanded a jury trial. A number of questions had arisen in the case in connection with the breach, the proper interpretation of the contract, and recoverable damages. Judge Parker stated:

> "These, however, should be decided in the light of the evidence which may be adduced upon a trial, not upon the affidavits presented on a motion to dismiss. It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that

> even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits."

The same eminent judge, in the case of *Pierce v. Ford Motor Co.,* (CA 4th, 1951) 190 F.2d 910, cert. den. (1951) 342 US 887, 72 S.Ct. 178, 96 L.ed. 666, in reversing a summary judgment for the defendant in a negligence case, stated:

> "From what we have said, it is clear that there were issues in the case for a jury to decide, and it was error to enter summary judgment for defendant for that reason. It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented."
>
> *loc. cit.,* at p. 915.

The Fifth Circuit, speaking through Judge Hutcheson, in *Whitaker v. Coleman, (supra),* forcefully states the controlling principles as follows:

> "* * * The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, and it

> cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. * * * To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. * * * Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."
>
> *loc. cit.,* at pp. 306, 307.

Again, in *Gray Tool Co. v. Humble Oil Refining Co.,* (CA 5th, 1951), 186 F.2d 365, the same circuit applied these principles to a court case, and after pointedly noting that the trial court, as too frequently happens, had allowed the summary judgment procedure to be misused to cut a trial short, observed "that short-cutting of trials is not an end in itself, but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through;" and that it is not the function of a court in ruling on a motion for summary judgment to draw fact inferences in

favor of the party for whom summary judgment is rendered.

loc. cit., at p. 367.

See also:

Chappell v. Goltsman, (CA 5th, 1950), 186 F.2d 215.

The last mentioned thought was also expressed by Justice, then Judge, Minton, speaking for the Seventh Circuit in *Campana Corp. v. Harrison,* (CCA 7th, 1943), 135 F.2d 334, where in a corporate taxpayer's action to recover excise taxes paid under protest, the parties were at issue as to whether the taxpayer had borne the tax burden, and whether its dealings with its sales company were at arm's length. Judge Minton stated: "Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. This action of the court was not proper * * *."

loc. cit., at p. 336.

On the other hand a party *opposing* summary judgment is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary judgment. This is well illustrated by *Ramsouer v. Midland Valley Railroad Co.,* (CCA 8th, 1943), 135 F.2d 101, a negligence action under the Federal Employers' Liability Act. In an earlier state action the state court had announced its intention to sustain defendant's demurrer to the evidence at the conclusion of plaintiff's case; whereupon plaintiff, with leave of court, had dismissed the action without preju-

dice. On the basis of that testimony and other material the District Court, in the subsequent case at bar, sustained defendant's motion for summary judgment on the ground that the facts showed no negligence. In reversing this summary judgment, Judge Gardner, for the Eighth Circuit, stated:

> "The record in this case is unusual in that it contains all the evidence introduced at the trial in the Oklahoma court. The question presented by such a motion (for summary judgment) is whether or not there is a genuine issue of fact. It does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists (citing cases). In considering such a motion, as in a motion for a directed verdict, the court shall take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. Viewing the evidence in the light most favorable to plaintiff, we think it presented a genuine issue of fact from which a jury might reasonably decide that Ramsouer's injuries resulted in whole or in part from the negligence of the defendant * * *."
>
> *loc. cit.,* at pp. 103, 106.

See also:

Lockie v. Wertheimer Cattle Co., (D. Minn. 1946), 5 FRD 45 (defendant entitled to all favorable inferences that may reasonably be drawn from the evidence on plaintiff's motion for summary judgment; denied).

Judge Riddick, also speaking for the Eighth Circuit in *Walling v. Fairmont Creamery Co., (supra),* stated:

> "On a motion for a summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt."
>
> *loc. cit.,* at p. 322.

See also:

Sprague v. Vogt, (CCA 8th, 1945), 150 F.2d 795, 801;

Ford v. Luria Steel & Trading Corp., (CA 8th, 1951), 192 F.2d 880;

Lockie v. Wertheimer Cattle Co., (supra).

In reversing a summary judgment for the defendant, Judge Delehant stated in *Traylor v. Black, Sivalls & Bryson,* (CA 8th, 1951), 189 F.2d 213:

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively

that the plaintiff would not be entitled to recover under any discernible circumstances (citing cases). A summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear (citing cases). And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment."

loc. cit., at p. 216.

Dulansky v. Iowa-Illinois Gas & Electric Co., (CA 8th, 1951), 191 F. 2d 881, further illustrates the improper use of the summary judgment procedure at the trial court level. This was an action to recover damages for the death of plaintiff's 10-year-old son allegedly caused by the negligent operation of defendant's bus in striking the child while he was riding a bicycle on a street. Defendant moved for summary judgment on the basis of the testimony taken at a coroner's inquest, and the affidavits of its bus operator, of the sole passenger on the bus at the time of the accident, and of two physicians. Plaintiff countered with certain affidavits and there were also submitted answers to certain interrogatories and possibly other documentary evidence.

After having the matter under advisement for six months, the trial court filed findings of fact and conclusions of law and granted defendant's motion. In reversing, Circuit Judge Gardner stated:

"A proceeding on motion for summary judgment is in the nature of an inquiry in advance of the trial for the purpose of determining whether

there is a genuine issue of fact and not for the purpose of determining an issue of fact. * * * *As a summary judgment presupposes that there is no genuine issue of fact, findings of fact and conclusions of law are not required.*[6] * * * It is apparent from a consideration of the court's findings and conclusions that in determining whether or not there was a genuine issue of fact the court gave no thought to what *inferences* might reasonably be drawn from the circumstances. The case is largely dependent upon circumstantial evidence. *The court also failed to view the evidence, as it should, in a light most favorable to the plaintiffs.* * * * The burden of proof was upon the movant, not upon the plaintiffs, and *all doubts are resolved against the movant.*" (Italics supplied.)

loc. cit., at pp. 883, 885.

The Tenth Circuit has followed the views expressed above in *Avrick v. Rockmont Envelope Co.*, (CCA 10th, 1946), 155 F.2d 568, when speaking through Judge Murrah it said as follows:

"The salutary purpose of Rule 56 is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present

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[6]Compare the use of findings of fact and conclusions of law in the present case (R. pp. 48-49) and Rule 5(e)(1) of the *Amended* Uniform Rules of the District Court for the District of Alaska, which was retained at the insistence of the District Judge in the present case, against a contrary recommendation of the Alaska Bar Association, based upon its conflict with Rule 56, FRCP and the cases decided thereunder. The Rule provides in pertinent part as follows: "(e) Motions for Summary Judgment: (1) There shall be served and filed with each motion for summary judgment * * * proposed findings of fact and conclusions of law * * *."

any substantial question for determination. Flimsy or transparent charges or allegations are insufficient to sustain a justiciable controversy requiring the submission thereof. The purpose of the rule is to permit the trier to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial (citing cases). But, it is not the purpose of the Rule to deprive litigants of their right to a full hearing on the merits if any real issue of fact is tendered (citing cases). The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification (citing cases). An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court. * * *"

loc. cit., at pp. 571, 573.

After discussing leading cases of his and other courts, Judge Fahy of the Court of Appeals for the District of Columbia Circuit, in *Dewey v. Clark,* (CA, DC 1950), 180 F.2d 766, offers the following excellent summary:

"Our study of the question makes the following points clear: (1) Factual issues are not to be tried or resolved by summary judgment procedures; only the existence of a genuine and material factual issue is to be determined. Once it is determined that there is such an issue summary judgment may not be granted; (2) In making this determination doubts (of course the

doubts are not fanciful) are to be resolved against the granting of summary judgment; (3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract; (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true; (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned."

loc. cit., at p. 772.

See also:

Wittlin v. Giacalone, (App. DC, 1946), 154 F. 2d 20;

Minor v. Washington Terminal, (CA DC, 1950), 180 F.2d 10;

United Meat Co. v. R.F.C., (CA DC, 1949), 174 F.2d 528.

This Honorable Court has similarly insisted in *Lane Bryant v. Maternity Lane, Ltd., of California,* (CA 9th, 1949), 173 F.2d 559, in the language of then

Judge, now Chief Judge Stephens, that: "judgment cannot validly be based upon a summary trial by affidavits" and that the parties are entitled to have issues of fact tried at a trial "through the introduction of exhibits and witnesses produced for direct and cross-examination."

loc. cit., at p. 565.

See also:

Pacific American Fisheries v. Mullaney, (CA 9th, 1951), 191 F.2d 137.

In *Cox v. English-American Underwriters,* (CA 9th, 1957), 245 F.2d 330, this Court in reversing summary judgment for defendant, said, (*per* James Alger Fee, J.) as follows:

> "In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury.[7] It may be that plaintiff cannot win this law suit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact."
>
> *loc. cit.,* at p. 333.

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[7]Trial by jury was demanded, as of right, in the present case. (R. p. 6).

See also:

Hoffman v. Babbitt Bros. Trading Co., (CA 9th, 1953), 203 F.2d 636;

Mitchell v. Union Pacific Railroad Co., (CA 9th, 1957), 242 F.2d 598.

In two recent cases, moreover, this Court has felt constrained to reverse summary judgments improvidently granted by the self-same District Court for the District of Alaska, Third Judicial Division. Thus, in the case of *Carr v. City of Anchorage,* (CA 9th, 1957), 243 F.2d 482, this Court held that when pleadings and affidavits raise certain disputed questions of fact, they must all be resolved in the favor of appellants for the purpose of considering the motion for summary judgment and the appeal therefrom. And see also: *New and Used Auto Sales v. Hansen,* (CA 9th, 1957), 245 F.2d 951, involving a somewhat unorthodox use of the summary judgment procedure by the same District Court.

In discussing the above principles and decisions, Professor Moore observes that most of these cases reverse the trial court's grant of summary judgment, indicating that the trial courts had too freely granted summary judgment and allowed the procedure as an improper substitute for a live trial. If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action.

6 *Moore's Federal Practice* 2120, 2121.

And see:

Petnel v. American Telephone & Telegraph Co., (SD NY, 1952), 13 FRD 249.

As has been shown above, the courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue to all the material facts, which, under applicable principles of the substantive law, entitled him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear as to what the truth is and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion *all inferences of fact from the proofs proffered at the hearing must be drawn against the movant in favor of the party opposing the motion.*

To satisfy the moving party's burden, the evidentiary material before the court, if taken as true, must establish the absence of *any* genuine issue of material fact, and it must appear that there is no real question as to the credibility of the evidentiary material, so that it is to be taken as true.

See:

6 *Moore's Federal Practice* 2123-2126 (and cases there cited).

The argument to follow will seek to demonstrate the applicability of the foregoing principles to the facts in the present case and the legal conclusions to be

drawn therefrom which, appellant contends, inevitably demonstrate that the judgment here appealed from is in error and should be reversed.

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2. THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF FACT, AND RULING AS A MATTER OF LAW, THAT BASED UPON THE RECORD PRESENTED, WITHOUT TRIAL, THERE WAS NO NEGLIGENCE ON THE PART OF APPELLEE, (DEFENDANT BELOW), BECAUSE THE ACCUMULATION OF SNOW AND ICE UPON APPELLEE'S SIDEWALK WHICH CAUSED APPELLANT'S INJURY WAS "NATURAL" IN CHARACTER; THAT APPELLANT (PLAINTIFF BELOW) WAS GUILTY OF CONTRIBUTORY NEGLIGENCE; AND HAD ASSUMED THE RISK OF HIS INJURIES, WHEN HE VENTURED UPON THE OBSTRUCTED SIDEWALK WITH KNOWLEDGE OF ITS CONDITION.

An examination of the record shows the following facts to be wholly uncontroverted: That on the day in question the appellant slipped and fell upon an accumulation of ice and snow on a sidewalk of the appellee City of Seward; that this occurred while appellant was lawfully proceeding upon such sidewalk; and that the serious injuries complained of resulted from such fall.

The following facts while controverted in the pleadings, are undisputed by the evidence insofar as there is any in the record: That the accumulation of ice and snow was of irregular shape, was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the sidewalk; that it had been permitted to remain, without removal or other remedial action by the appellee for the entire winter season; that there had been no recent addition to it, by precipitation, for at least

several days; that appellee knew, or by the exercise of ordinary care and diligence could have known, of the condition and failed to take any action to cure it; that it was not impracticable for appellee to remove the snow, particularly since it had already shifted the burden of actual removal upon the owners of adjoining lots and merely needed to enforce this ordinance in order to discharge its legal duty as a municipality *(vide supra)*; that appellant's injuries resulted proximately from the failure of appellee to remove the obstruction and that such injuries were painful, serious and permanent; that appellant in traversing the obstructed sidewalk in question, the condition of which was known to him, was travelling the shortest distance from his point of departure to his point of destination; that the alternate routes, *e.g.,* along the middle of the street on Fourth Avenue or along the sidewalk on the Westside of Fourth Avenue were likewise hazardous or obstructed, namely, the street was covered with a sheet of ice formed when water used in a recent fire had frozen, the same condition applying to that portion of the sidewalk lying on the Westside of the street; that the street was further blocked by cars parked at a 30-degree angle; and that the sidewalk on the Westside of the street was obstructed by a similar accumulation as that situated on the Eastside, where appellant fell; that the climatic conditions of the locale of the accident are substantially similar to that experienced in many cities of comparable size within the northern and central parts of the United States (not directly raised by the pleadings, but uncontradicted by evidence).

The following facts (or inferences therefrom) are in dispute: Whether appellant knew before, or learned after his accident, that other persons had fallen previously at, or in the general vicinity of, the place where appellant fell; whether the alternate routes open to plaintiff were less, equally or more dangerous than the one selected by him with knowledge of the obstruction; whether appellant's election to use the sidewalk with knowledge of its condition, at the time and under the circumstances, and considering his footgear, weight, and physical capabilities, was such as to constitute a failure to use reasonable care under all the circumstances or amounted to a voluntary assumption of risk; whether the accumulation of snow and ice which caused appellant's fall was "natural" or was of such elevated, uneven and ridged nature as to impose upon the municipality (appellee herein) a legal duty of removal.

Likewise, there are a number of possible inferences or conclusions which may be drawn from the facts both disputed and undisputed. Inferences most favorable to the appellant (plaintiff below) would be that the accumulation of ice and snow which caused this fall was not a natural one, but rather was caused by the compaction of ice and snow, into an uneven and ridged obstruction, constituting a hazard or nuisance; that although knowing of the existence of this condition, appellant used ordinary prudence in choosing this, the shortest route, in preference to the other, equally known, hazards of glare ice and angle-parked cars on the street, and glare ice and similar snow and ice ridges on the opposite sidewalk; that

appellant used ordinary care and caution, under all the circumstances, in attempting to traverse the known obstruction on the East sidewalk; that plaintiff in electing one of several dangerous alternatives did not assume the risk of the fall and injury which occurred. As has been seen, contrary to the rules enunciated by the cases cited above, the District Court elected to resolve all these issues, and to draw all such inferences, in a manner adverse to appellant (plaintiff below).

There is a wealth of precedent available with respect to the basic issues of substantive law governing this case. Thus with respect to the legal duty involved, it was held early that a municipality is liable for injuries caused by accumulations of ice and snow on a sidewalk, making it slippery and unsafe. This is based upon the city's neglect to remove obstructions from such causes. The duty to do so is absolute and obligatory.

Collins v. City of Council Bluffs, (Ia., 1871), 7 Am. Rep. 200;

Finnane v. Perry, (Ia., 1914), 145 NW 494.

The foregoing rule has been generally followed, without deviation, and is supported by numerous later cases on this subject.

Suttmoeller v. St. Louis, (Mo., 1921), 230 SW 67;

Schroeder v. Hartford, (Conn., 1926), 132 A. 901;

Beane v. St. Joseph, (Mo., 1922), 240 SW 840;

Higgins v. Verdun, (Quebec, 1927), 65 C.S. 150;

Mesberg v. Duluth, (Minn., 1934), 254 NW 597;
Smith v. District of Columbia, (D.C., 1951), 189 F.2d 671, 39 ALR 2d 773.

In order to render a municipality liable, the interference with travel must be unusual, that is to say, different in character from conditions ordinarily and generally brought about by the winter weather in the given locality. It is firmly established that whether or not an accumulation is out of the ordinary or is "natural" is a question of fact for the jury.

Anderson v. City of St. Cloud, (Minn., 1916), 158 NW 417;
Cloughessey v. Waterbury, (Conn., 1884), 50 Am. Rep. 38;
Townsend v. Butte, (Mont., 1910), 109 P. 969;
Harding v. St. Joseph, (Mo., 1928), 7 SW 2d 707.

If snow and ice is permitted to remain until, either by the passing of pedestrians over it, or otherwise, the surface has become so rough or uneven that it is difficult or dangerous to pass over it, it constitutes a defect so as to render the municipality liable in damages to pedestrians who, in the exercise of ordinary care, are injured thereby; provided, the municipality has actual or constructive notice of the dangerous condition of the walk, and has had a reasonable opportunity to remedy the defect.

Smith v. Chicago, (CC ND Ill., 1889), 38 F. 388;
Street v. Holyoke, (Mass., 1870), 7 Am. Rep. 500;

McManus v. Duluth, (Minn., 1912), 179 NW 906;
Smith v. Cloquet, (Minn., 1912), 139 NW 141;
Walsh v. Buffalo, (N.Y., 1897), 44 N.Y.S. 942;
Johnson v. Buffalo, (N.Y., 1917), 165 N.Y.S. 372;
Klaus v. Buffalo, (N.Y., 1903), 83 N.Y.S. 620;
Jackson v. Grand Forks, (N.D., 1912), 140 NW 718, 45 LRA (NS) 75;
Leclerc v. Montreal, (Quebec, 1898), 15 C.S. 205;
Touhey v. Medicine Hat, (Alberta, 1912), 7 D.L.R. 759, aff'd 10 D.L.R. 691;
Smith v. St. Joseph, (Mo., 1923), 250 SW 616;
Suttmoeller v. St. Louis, (supra);
Boyd v. Duluth, (Minn., 1925), 204 NW 562;
Buttmi v. New York, (N.Y., 1931), 254 N.Y.S. 282;
Randall v. Hot Springs, (S.D., 1924), 199 NW 40;
McDonough v. St. Paul, (Minn., 1930), 230 NW 89;
Speakman v. Dodge City, (Kans., 1933), 22 P.2d 485;
Woodring v. Duluth, (Minn., 1947), 29 NW 2d 484;
Moscon v. Philadelphia, (Pa., 1942), 24 A. 2d 30.

With respect to the issue of notice, the long continuance of an observably dangerous condition has

been uniformly held to charge the city with constructive notice.

McLoughlin v. Corry, (Pa., 1874), 18 Am. Rep. 432 (all winter);

McPherson v. Buffalo, (N.Y., 1897), 43 N.Y.S. 658 (9 days);

Llewellyn v. Wilkes-Barre, (Pa., 1916), 98 A. 886 (4 days-1 week);

Spencer v. Philadelphia, (Pa., 1923), 120 A. 131 (1 month);

Myers v. Des Moines, (Ia., 1923), 193 NW 537 (3 weeks);

Randall v. Hot Springs, (supra), (5 days);

Douris v. Butte, (Mont., 1922), 207 P. 1001 (over 5 days);

McClain v. Duluth, (Minn., 1925), 203 NW 776 (6 days);

Buffalo v. Des Moines, (Ia., 1922), 186 NW 844 (6-7 days);

Linton v. Jones, (Ind., 1921), 130 NE 541 (several weeks);

Keating v. New London, (Conn., 1926), 133 A. 586 (several weeks);

Smith v. District of Columbia, (supra), (10 days);

Denver v. Brubaker, (Colo., 1935), 51 P.2d 352 (unspecified; possibly 48 hours).

Removal of snow and ice must be made by the city within a reasonable time.

Touhey v. Medicine Hat, (supra);

Jackson v. Grand Forks, (supra);

Lucy v. Norwich, (Conn., 1919), 106 A. 762;
Penor v. Glens Falls, (N.Y., 1910), 122 N.Y.S. 1072;
Smith v. New York, (N.Y., 1953), 125 N.Y.S. 2d 123.

Generally, the question as to whether or not the municipal corporation is liable in damages for the injury sustained is one of fact for the jury under the particular circumstances of each case.

Hawley v. Gloversville, (N.Y., 1896), 38 N.Y.S. 647 (negligence of city);
Daly v. Des Moines, (Ia., 1918), 166 NW 712 (same);
Denver v. Wilson, (Colo., 1927), 254 P. 153 (same);
Parks v. Des Moines, (Ia., 1923), 191 NW 728 (same);
Holland v. Auburn, (Wash., 1931), 297 P. 769 (same);
Bull v. Spokane, (Wash., 1907), 89 P. 555, 13 LRA (NS) 1105 (nature of condition, notice, proximate cause);
Rose v. Fort Dodge, (Ia., 1917), 155 NW 170 (condition of surface, as against admission of plaintiff);
Byington v. Merrill, (Wis., 1901), 88 NW 26 (condition of surface);
Smith v. D. C., (supra), (same);
Delacy v. Mason City, (Ia., 1949), 38 NW 2d 587 (proximate cause);
Frechette v. New Haven, (Conn., 1926), 132 A. 467 (notice);

Barrett v. Canton, (Mo., 1936), 93 SW 2d 927 (practicability of removal);
Alamosa v. Johnson, (Colo., 1936), 60 P.2d 1087 (same).

In an early leading case, decided by the Supreme Court of the State of New York, entitled *Williams v. City of New York,* (N.Y., 1915), 108 NE 448, the plaintiff had slipped and broken his leg on a sidewalk adjacent to a vacant lot between 138th and 139th Streets. The sidewalk was all covered with snow and hard ice, packed down and about two inches thick. The snow and ice had been there during five or six days before the accident. The last snowstorm previous thereto occurred about five or six days before; it was quite a heavy one. None of the snow was removed after the snowstorm and before the accident. The condition of the ice was rough, where people had packed down the snow, and ice had formed on top of it. There had been small flurries of snow and rain two days before the accident. It was held, per Bartlett, C. J., as follows:

> "The jury would have been warranted in finding the facts as above stated. These facts show *prima facie:* (1) A dangerous and unusual condition of the street; and (2) the lapse of sufficient time to charge the city with constructive notice of that condition."
>
> "Another point argued against the plaintiff grows out of his conduct on the occasion of the accident. He had slipped down on the sidewalk just before he fell the second time and broke

his leg. He pursued his way along the icy sidewalk instead of crossing the street to a sidewalk which was entirely clear. This it is said, was contributory negligence, not merely justifying, but requiring the nonsuit. *It may have been contributory negligence as a matter of fact, but we think it was a question for the jury* (citing authority)." (Italics supplied.)

loc. cit., at p. 449.

Quoting from an earlier case, the New York court continued as follows:

"The general conditions of our variable winter climate, which are the work of nature, cannot be guarded against, but if the city should negligently suffer snow and ice to remain and accumulate in a particular place, until it became of a permanent nature and a dangerous obstruction to pedestrians, then it would be liable, and this is the measure of its liability. We think that this is precisely the condition of things which the jury might have found to exist in the present case."

loc. cit., at p. 450.

Accordingly, the court reversed a judgment of nonsuit and granted the plaintiff a new trial.

Numerous other cases have ruled on the issue of contributory negligence incident to injuries arising when pedestrians were caused to fall on a slippery sidewalk. The general rule is stated to the effect that a pedestrian is not ordinarily required to forego the use of a sidewalk because of a known defect, but he may proceed under the requirement that he use care

commensurate with the known danger. Thus the pedestrian is entitled to use a sidewalk upon which there exists a ridge of ice, using proper care in so doing.

Muncie v. Hey, (Ind., 1905), 74 NE 250;
Dean v. Newcastle, (Pa., 1901), 50 A. 310;
Evans v. Utica, (NY., 1877), 25 Am. Rep. 165.

Whether or not a pedestrian exercised proper care in using the icy walk is a question for the jury.

Penor v. Glens Falls, (supra);
Powers v. Chicago, (Ill., 1886), 20 Ill. App. 178;
Brown v. White, (Pa., 1903), 55 A. 848;
Goff v. Little Falls, (N.Y., 1892), 20 N.Y.S. 175;
Isham v. Broderick, (Minn., 1903), 95 NW 224.

In the case of *McPherson v. Buffalo, (supra),* it was held to be well settled that one is not necessarily guilty of contributory negligence in attempting to pass over a walk which he knows to be in a slippery condition. It was there said by the court that a traveler has a right to use a sidewalk, although he knows that it is in an icy condition. To the same effect are the following cases:

Diffenderfer v. Jeffersonville, (Ind., 1918), 118 NE 836;
Evans v. Philadelphia, (Pa., 1903), 54 A. 775, 97 Am. St. Rep. 732.

The reason for this rule is often stated to the effect that sidewalks are constructed for people to walk on, and they have a right to walk thereon along the most

convenient route to reach their destination and, while they cannot recklessly place themselves in danger of accident, yet, on the other hand, they are not driven to forsake such walks, merely because there may be some danger in passing over them, and especially, when there is no safer route reasonably convenient.

Smith v. Yankton, (S.D.), 121 NW 848;
Jackson v. Grand Forks, (supra);
Lucy v. Norwich, (supra).

In the *Evans v. Philadelphia* case *(supra),* the court said that it is not contributory negligence for a pedestrian, with danger around him on all sides, not to select from all the dangerous paths the one which he ought to know is the least so. In any event, the cases hold, whether another and safer way was conveniently open to one who was injured by falling on a slippery sidewalk is a question for the jury.

DeWall v. Sioux City, (Ia., 1917), 164 NW 640;
Hampson v. Taylor, (R.I., 1885), 8 A. 331;
Twogood v. New York, (N.Y., 1886), 6 NE 275;
Kendall v. Albia, (Ia., 1887), 34 NW 833;
Williams v. New York, (supra);
Gordon v. Belleville, (Ontario, 1888), 15 Ont. Rep. 26;
Touhey v. Medicine Hat, (supra);
Steck v. Allegheny, (Pa., 1906), 62 A. 1115;
Smith v. Yankton, (supra).

It is, of course, basic that questions of negligence, contributory negligence, and assumption of risk are ordinarily questions of fact for the jury.

See, *e.g.:*

Ramsouer v. Midland Valley Railroad Co., (supra), (reversing summary judgment for defendant in wrongful death action against railroad).

Mr. Beach, in his venerable treatise on the subject of contributory negligence summarizes the rule to the effect that "knowledge of an existing danger or defective condition does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence; but it is a disputable presumption and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances."

Beach on Contributory Negligence, (3rd Ed., Rev.), pp. 56, 57 and cases there cited.

The same conservative text writer states the proposition that a pedestrian, in a city on a dark night, well acquainted with the unsafe condition of a sidewalk, is not guilty of contributory negligence in taking it as the most direct way to his home, instead of some other way also unsafe, if he acted with that care with which a prudent man should act; and this is a question for the jury (citing cases).

Ibid., at p. 57. (Note 9.)

Continuing, the text quoted above concludes that in general *it cannot be doubted that the question of contributory negligence is a question of fact and not of*

law. Whenever there is any doubt as to facts, it is the province of the jury to determine the question; or whenever there may reasonably be a difference of opinion as to the inferences or conclusions from the facts, it is likewise a question for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts (italics supplied).

Id., at pp. 632-634.

The conclusion seems inescapable that the District Judge below was not aware of, or chose to ignore, these basic and elementary propositions of law.

The cases which have applied these fundamental principles to instances involving pedestrians walking on a known icy walk are legion; and they invariably hold that whether such acts constitute contributory negligence is always a question for the jury.

See *e.g.:*

Spencer v. Kansas City, (Kan., 1914), 139 P. 1029;

Brown v. White, (supra);

Welsh v. Amesbury, (Mass., 1898), 49 NE 735;

Smith v. Spokane, (Wash., 1897), 47 P. 888;

Coffin v. Palmer, (Mass., 1894), 38 NE 509;

Dewire v. Bailey, (Mass., 1881), 41 Am. Rep. 219;

Phillips Petroleum Co. v. Childress, (CCA 10th, 1935), 78 F.2d 861, 863;

Great Atlantic & Pacific Tea Co. v. Chapman, (CCA 6th, 1934), 72 F.2d 112, 114;

Palmer v. Edgerly, (N.H., 1935), 181 A. 125, 127.

To the same effect is the recent case of *Brittain v. City of Minneapolis,* (Minn., 1957), 84 NW 2d 646, where it was said that where reasonable men may differ as to what constitutes ordinary care and proximate causal connection upon the evidence presented, questions of negligence and proximate cause, as well as contributory negligence, are questions of fact for the jury; and it is only in the clearest of cases, where the facts are undisputed, and where it is plain that all the reasonable men can draw only one conclusion, that the question of negligence becomes one of law.

loc. cit., at p. 655.

Likewise, in a case involving an action for injuries sustained when the plaintiff slipped on ice while walking from the driveway of defendant's filling station to a gasoline pump, under evidence that as plaintiff was being helped up she observed that ice was under her and a little around her and that plaintiff had ample opportunity to reach the gasoline pumps safely and over an ice free path, the question of whether the plaintiff was guilty of contributory negligence in failing to notice and avoid the danger was for the jury.

Lord Baltimore Filling Station v. Miller, (App. D.C., 1940), 110 F.2d 698.

In this Honorable Court, in a case arising in Alaska, where the plaintiff fell through a hole in a wooden walkway which she knew to be in a rotted and dilapidated condition, it was held that the question of contributory negligence was properly one for the jury.

Alaska Treadwell Gold Mining Co. v. Mugford, (CCA 9th, 1921), 270 F. 735, 756.

The same rule has been held to apply with respect to the defense of "assumption of risk", which in this type of situation is often said to be merely another facet of the issue of contributory negligence. Thus the mere knowledge of the icy condition of a sidewalk has been held specifically not to preclude one from using the walk without assuming the risk of the dangerous condition.

Holbert v. Philadelphia, (Pa., 1908), 70 A. 746, 20 LRA (NS) 201.

Likewise, in a case involving injury to a plaintiff who walked across a passageway knowing it to be wet and slippery, a dismissal at the close of plaintiff's case was reversed by the highest court of the State of New Jersey, holding that *the principle of "assumption of risk" contemplates that one, with knowledge of a risk, or facts to put a reasonably prudent person on notice of risk, must exercise the degree of care that the risk requires. This is a question for the jury.*

Doherty v. Trenton Trust Co., (N.J., 1956), 126 A.2d 899, 902.

It seems evident from the foregoing authorities and the record in this case, that the District Judge would have committed reversible error had he deprived the plaintiff (appellant herein) of his right to the demanded jury trial with respect to *any one* of the material elements of his case as to which the facts, or at least the inferences from these facts, were in dispute, namely, the nature and origin of the obstruction; the question of contributory negligence; and the issue of assumption of risk, under all the circumstances of the case. Instead, the District Judge elected not

merely to draw legal conclusions, but even to make findings of fact, so designated, without the benefit of trial or the aid of a jury, to which appellant (plaintiff below) was constitutionally entitled and which he had expressly demanded. It would appear, in the words of Judge Hutcheson, in *Gray Tool Co. v. Humble Oil & Refining Co.,* (CA 5th 1951), 186 F.2d 365, that:

> "* * * this is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; * * * here, as so often before, it has served only to prove that shortcutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through."

CONCLUSION.

Based upon the reasons and the authorities cited above, appellant earnestly contends that the summary judgment and the amended judgment in favor of the appellee (defendant below) should be reversed and the cause remanded with instructions that it be set for *early trial* by a jury.

Dated, San Francisco, California,
June 30, 1958.

Respectfully submitted,
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